

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)

U.S. Army, (b) (6))

Headquarters and Headquarters Company, U.S.)

Army Garrison, Joint Base Myer-Henderson Hall,)

Fort Myer, VA 22211)

**RULING: DEFENSE MOTION -
COMPEL IDENTIFICATION OF
BRADY MATERIALS**

DATED: 7 June 2012

Defense moves the Court to exercise its inherent discretion and order the Government to identify or separate *Brady* material¹ when providing discovery to the Defense. The Government opposes. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

1. Defense asserts the Government has provided the Defense with twelve (12) pages of *Brady* material taken from an assessment/investigation/working document review by the Office of the National Counterintelligence executive (ONCIX), Office of the Director of National Intelligence (ODNI), and the Information Review Task Force (IRTF) of the Defense Intelligence Agency (DIA). Additionally, the Government has provided the Defense with approximately 9,000 pages, from the Federal Bureau of Investigation ("FBI"), which contain *Brady* material and additional discovery. The pages are redacted. Defense asserts the FBI files are not text searchable.
2. There are 4 available facilities where the Defense can store and access the FBI files: (1) Trial Defense Office, Fort Myer, VA – available since 12 October 2010; (2) Trial Defense Office, Fort Leavenworth (TDS) – available since 22 June 2011; (3) Trial Defense Office, Fort Meade, MD – available since 10 August 2011; and (4) Naval War College, Rhode Island, approximately 30 miles from Mr. Coombs' office. At the request of Civilian Defense Counsel (CDC), Mr. Coombs, the Government provided facilities in Rhode Island to make it easier for him to access and store classified information without having to travel to the National Capital Region.
3. There are currently 3 Defense Counsel representing the accused: Mr. Coombs, CDC, MAJ Hurley, Individual Military Counsel (IMC), and CPT Toomey (detailed defense counsel). The accused released his original detailed defense counsel, MAJ Kemkes and CPT Bouchard, during the Article 39(a) session on 15-16 March 2012. CPT Tooman was detailed to the case during the Article 39(a) session 24-26 April 2012 and MAJ Hurley was added to the Defense team as Individual Military Counsel on 6 June 2012 during the current Article 39(a) session. Defense has not requested additional staffing for the defense team.

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

4. The Accused is in pretrial confinement at Fort Leavenworth, Kansas. There is a safe to store classified information at the Fort Leavenworth trial defense office.

5. The parties dispute whether the Government is required to release the non-*Brady* portions of the FBI file under RCM 702(a)(2) as material to the preparation of the defense. The bulk of the FBI discovery given by the Government to the Defense thus far is *Brady* material. There is no evidence that the Government has “padded the file” or otherwise exercised bad faith in burying the *Brady* needle in the haystack of FBI files disclosed.

6. Neither RCM 701(a)(6) nor *Brady* require the Government to identify or separate what material it discloses in discovery is *Brady* material. See *U.S. v. Warshak*, 631 F.3d 266 (6th Cir. 2010) (declining to order the Government to organize and index discovery when not required by Federal Rule of Criminal Procedure 16). The Court has not been presented with any military cases addressing this issue, however, the Court agrees with the 5th Circuit that there is no general duty that requires the Government to direct the Defense to exculpatory evidence within a larger mass of disclosed evidence. *U.S. v. Skilling*, 554 F.3d 529, 576 (5th Cir. 2009).

7. Defense relies primarily on *U.S. v. Salyer*, 2010 WL 3036444 (E.D.Cal.); and *U.S. v. Hsia*, 24 F.Supp.2d 14 (D.D.C. 1998). Both of those cases involved “open file” cases with far more voluminous discovery than at issue in this case and, in each, there was evidence that the prosecution dumped the haystack of discovery requiring the Defense to find the *Brady* needle. In *Salyer*, the Court accepted the general rule set forth in *Skilling* and *Warshack*, but, as a matter of case management, ordered the Government to identify *Brady* material from what the Court described as a massive amount of documentary information collected over 5 years consisting of multiple gigabytes, pages numbering in the millions, and hardcopy information filling more than 2 “pods” (storage containers).

8. Discovery is voluminous in this case, but not nearly to the extent as in *Salyer* or *Hsia*. To date, the Government has provided the Defense with more than 43,886 documents consisting of 411,366 pages. The approximately 9000 pages the Defense alleges has been disclosed from the redacted FBI files are a small part of the total discovery to date. There is no evidence that the Government is padding discovery to hide *Brady* material.

9. The Court finds no good cause to deviate from the general rule that the Government is not required to sift through each item of discovery and separate or identify *Brady* information contained within a larger mass of disclosed evidence.

RULING: The Defense Motion to Compel Identification of *Brady* material is **Denied**.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit